

EXHIBIT 5

CONFIDENTIAL

1

2 -----x
3 IN THE MATTER OF
4

5 MADOFF CHARITIES INVESTIGATION
6 -----x
7

8 120 Broadway
9 New York, New York
10

11 January 30, 2009
12 10:02 a.m.
13

14 EXAMINATION UNDER OATH of J.
15

16 EZRA MERKIN, pursuant to Subpoena, held at
17 the above place, date and time, before
18 Alice Schulman, a Notary Public of the
19 State of New York.
20
21
22
23
24
25

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

1 J. E. Merkin

2 A. I believe.

3 Q. And describe how that came
4 about.

5 A. We had had several
6 conversations, meetings or telephone in
7 which he described market making
8 activities in his office and money
9 management activities in his office.

10 He walked through a strategy
11 that he was then interested in executing
12 on behalf of clients, and the decision
13 came about that it made sense to allocate
14 some capital to him and invest some
15 capital in those strategies.

16 Q. What was the strategy he
17 described to you?

18 A. At that time the strategy
19 involved the purchase of individual
20 stocks, preponderantly the purchase of
21 individual stocks, puts were beneath them
22 and the puts were to be bought, the calls
23 were to be sold and the stocks were to be
24 bought. So you would long a stock, long a
25 put option that would have a strike price

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

10

1 J. E. Merkin

2 beneath the price of that stock and short
3 a call that had a strike price above the
4 price of the stock.

5 The put and the call had the
6 same expiration dates, the options had the
7 same expiration dates.

8 Q. Is there a name associated with
9 that strategy?

10 A. If it's done on individual
11 stocks, it might be called a split strike
12 strategy. It might be called buying the
13 puts, writing the calls, something like
14 that.

15 Q. And had you done the strategy
16 yourself?

17 A. We had looked at options related
18 strategies and options arbitrage or
19 related strategies in which they thought
20 there may be some market inefficiencies
21 between premiums or premium on puts and
22 calls relative to stocks. I don't think
23 we had done much with it.

24 Q. And the split strike strategy,
25 is that one that stayed constant

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

128

1 J. E. Merkin

2 Q. Just to clarify, what I'm
3 understanding you to say, and tell me if
4 this is a fair characterization, the play
5 in execution was for the vast most part in
6 the option trading, and the option trading
7 that was over-the-counter or unreportable?

8 A. If you permit me to edit what
9 you said, I would take out vast. I would
10 say for the most part, I'm not sure I
11 would say the vast most part. That was
12 formidable on his stocks.

13 Maybe this is worth a word or
14 two. When you said Madoff was a legend,
15 he was a legendary person, he was. I
16 don't know if you were saying that
17 seriously or facetiously.

18 MR. LEVANDER: We are talking
19 about a legend of one kind pre
20 December 11th.

21 A. Fair enough. You're talking
22 about a guy who had a broker-dealer
23 license for 38 years. You're talking
24 about somebody who had massive market
25 share. He was the guy that took on the

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

129

1 J. E. Merkin

2 New York Stock Exchange and eventually
3 won. They had hegemony. He shed them of
4 it. He did it by basically being a
5 wholesale upstairs trader.

6 He would say to me routinely if
7 I asked him regularly, which doesn't mean
8 every time but reasonably frequently, what
9 percentage of the New York Stock Exchange
10 volume are you doing today. The answer was
11 low teens, sometimes eight or nine.

12 At the beginning he was the
13 source, he was the beneficiary of the
14 Stock Exchange off-board trading room. So
15 if you were a member firm, if you were
16 Merrill Lynch, I'm picking on Merrill,
17 it's not meant to be any specific example,
18 you could not change New York Stock
19 Exchange stocks other than through the
20 floor, originally 24 hours a day, and then
21 nine to four.

22 He didn't have a seat. He
23 wasn't a member firm, so he could do the
24 upstairs trading all day, every day. The
25 13 percent sounds like an incredibly high

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

130

1 J. E. Merkin

2 figure but it's really incredibly
3 understated because that's the whole stock
4 exchange trading in the 150 (check) names
5 that he cared about he could be 40 percent
6 of the volume.

7 When we were in the merger
8 arbitrage business, okay, when there was
9 just more to do in the merger arbitrage
10 business, which has relevance to Bernie's
11 strategy, we would occasionally get a name
12 which was Bernie's name, Pfizer is buying
13 Wyeth. If Wyeth was a name of Bernie's
14 150 names, he was 40 or 50 percent of the
15 volume in the wholesale area, not in what
16 we were doing together but in that
17 incredible market making business he had,
18 and that was the real legend.

19 And at the end of the Madoff
20 investigation we'll find out if the market
21 making business was for real or not real,
22 but I bet you it was. This is just a
23 hunch. That was where a lot of the
24 executions came and it played off on
25 options, that's where you really had

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

131

1 J. E. Merkin

2 the --

3 MR. LEVANDER: To put it in
4 perspective, we have given you, among
5 other things that we've given you,
6 articles that were thrown into the due
7 diligence file. And if you look at
8 those articles in 1990, and I may be
9 off, but I think this is right, the
10 Wall Street Journal and New York Times
11 said that five entities got together
12 to create an electronic trading
13 exchange. Those were Citi, which were
14 Solomon Smith Barney, Merrill, Goldman
15 Sachs, Morgan Stanley and Bernie
16 Madoff. And that's the scope and
17 stature he had in that business.

18 MR. CORNGOLD: I think we
19 understand that.

20 MR. LEVANDER: Fine. I'm trying
21 to be helpful.

22 A. I would only amend what Andy
23 said. You look at him and tick off his
24 fingers, those four were half the
25 business, he was the other half. He

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

132

1 J. E. Merkin

2 wasn't 20 percent. Those four guys came
3 to him and said would he like to do a
4 joint venture on the market making side.

5 EXAMINATION BY

6 MR. SANGEAP:

7 Q. Was he a market maker in
8 options?

9 A. I think the answer is yes,
10 meaning yes and no. Bernie didn't boast
11 much. Bernie claimed to me he had a very
12 significant role in inventing the OEX.

13 If you know about the history of
14 options, it would be a very big thing. I
15 asked a couple of guys in Chicago, I said
16 is this right or wrong, they said more
17 right than wrong. This is all third-hand
18 conversations. They don't mean a lot.

19 He had a significant volume in
20 options that he was doing as a market
21 maker, significant volume when the big
22 board refused to let their floor
23 specialists make markets in options in the
24 names that they were specialists in at the
25 same time.

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

133

1 J. E. Merkin

2 It was called side-by-side
3 market making, and it was forbidden on the
4 floor. For whatever policy reasons that I
5 don't know, and the little I do know don't
6 make a lot of sense. So when he had this,
7 when the cartel gave him this opportunity,
8 he sat and made options.

9 This goes back quite awhile, but
10 I remember a visit to Bernie and his
11 traders when he showed me what they called
12 a Madoff screen which was a proprietary
13 screen on which they spent fortunes every
14 year upgrading and keeping up the same
15 thing where they would show stocks and
16 their options on the same screen. It was
17 like a quarter panel that was the options
18 screen, and they were making option
19 markets in the options. But those were in
20 stocks and not necessarily OEX's.

21 Later on, I mean later on the
22 whole thing changed. Later on the
23 off-board trading changed. Nothing stays
24 that static in markets. The whole New
25 York Stock Exchange thing, and that was a

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

134

1 J. E. Merkin

2 lot of conversations, where do changes in
3 these markets bring the strategy.

4 Q. Just focussing on the last five
5 years. Are you aware of whether Mr.
6 Madoff made a market in --

7 A. OEX's?

8 Q. -- OEX's or the 100 stocks --

9 MR. LEVANDER: Let him finish
10 his question.

11 Q. -- stock options?

12 A. I don't know for sure.

13 Q. Did you have any conversations
14 with him concerning whether he made
15 markets for S&P 100 options?

16 A. My most recent conversation with
17 him about that subject, okay, was so near
18 the end that I'm not sure today I believe
19 anything said in, in the fourth quarter of
20 '08. It was either October or November.

21 Q. What did he say in that
22 conversation?

23 A. We had a conversation about the
24 counterparty risk in the puts, what
25 percentage of listed puts I was using

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400